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Supreme Court of the United States

GENERAL BOX COMPANY, - - - Petitioner,

versus

CENTRAL METAL PRODUCTS COMPANY, - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

GENERAL BOX COMPANY,
Petitioner,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

No. _____.

GENERAL BOX COMPANY, - - - *Petitioner,*

v.

CENTRAL METAL PRODUCTS COMPANY, - *Respondent.*

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Supreme Court of the United States

No. _____

GENERAL BOX COMPANY, - - - *Petitioner,*

v.

CENTRAL METAL PRODUCTS COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

JURISDICTION.

The judgment of the Court of Appeals of the Sixth Circuit, a review of which is sought, was entered on April 7, 1949 (R. 97). An order denying petitioner's petition for rehearing was entered May 9, 1949, by the Court of Appeals (R. 109). The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the question whether, in a diversity of citizenship case, under the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, a remittitur should be allowed by the District Court instead of a new trial, when, under the Federal rule and State law of the forum, a new trial must be granted, as well as whether the District Court is bound by the law of the forum State to the effect that the parol evidence rule is a matter of substantive law and not a rule of evidence.

The facts are that on May 19, 1947, the petitioner and respondent entered into a contract whereby the respondent was to have the right to stamp "box irons" used by the petitioner in the Louisville, Kentucky, area for a period from that date until September 19, 1949 (R. 4-5). The prices to be paid were set out in the contract, and the only exception to the respondent's exclusive rights was that the previous stamping manufacturer could continue to stamp irons from metal in its possession on May 19, 1947 (R. 5). The petition alleged breach of contract by the petitioner, and damages were asked to compensate for respondent's lost profits (R. 3-4). The petition was removed in the proper manner from the State Court, as the damages alleged were $30,000.00, and there was diversity of citizenship since the petitioner is a Delaware corporation and the respondent is a Kentucky corporation (R. 6-11).

The making of the contract was properly shown by the respondent (R. 23-24) and the breach of the contract was not denied by the petitioner (R. 72). The question here involved is the amount of damages. Over appropriate objection that the testimony violated the parol evidence rule, Robert F. Lenz (R. 28), William McMahon (R. 37-38) and William C. Embry (R. 63) were allowed to testify as to negotiations leading up to the contract, even though the contract was in writing and completely covered the subject:

> "Central Metal Products, Inc. shall have exclusive rights to stamp all Generalite box irons used by General Box Company in the Louisville area, except those made from steel already in the hands of the present stamping manufacturer on the above date."

There is no dispute that 849,000 stampings were used by the petitioner from the date of contract (May 19, 1947) to date of trial (April 12, 1948) (R. 67). However, under the contract some of the stampings were properly purchased from others. Therefore, the number improperly used up to the date of trial was 422,000 (R. 72). It must be emphasized that these figures are not questioned in any manner and are uncontroverted in the record. At the date of trial the contract had a little over five months to run (April 12, 1948, to September 19, 1948). The uncontroverted testimony is to the effect that during this period the requirements of the petitioner would average 21,000 stampings per month for that period (R. 70). This makes a grand total of 527,000 stampings. If the

527,000 stampings were all of the highest price of $14.10 per thousand (R. 3-4), the gross sales price would be $7,430.70. The respondent claims that its profit would have been 27 per cent of the gross (R. 74). Assuming all of this to be true, and giving the respondent the benefit of every doubt in its favor, the lost profits to the respondent would amount to only $2,006.29. The petition alleges the respondent's damages to be its lost profits (R. 31).

The jury returned a verdict for the respondent in the sum of $19,000.00 (R. 13), and judgment was entered in accordance therewith. The petitioner filed a motion for new trial (R. 14) on the grounds of the admission of incompetent evidence offered by the respondent, that the verdict was excessive and not justified by the evidence in the case, and was the result of passion and prejudice of the jury against the petitioner, and that the court erred in overruling this petitioner's motion for a directed verdict at the conclusion of the plaintiff's case and at the conclusion of all the evidence (R. 14). The respondent filed an offer of remittitur of $11,500.00 (R. 83-84), which was ordered by the District Court, making the judgment $7,500 as finally entered (R. 88). The trial judge filed a memorandum in support of his ruling (R. 84), stating that there is nothing in the record to indicate any passion or prejudice (R. 87), and overruled petitioner's motion for a new trial (R. 87-88).

The petitioner in the proper manner took an appeal from this judgment to the Court of Appeals for the Sixth Circuit (R. 88-89). On April 6, 1949, the case

was argued and submitted in the Court of Appeals (R. 97), and that court affirmed without opinion the judgment of the District Court (R. 97). A petition for a rehearing was filed (R. 99), which the Court of Appeals denied (R. 109).

QUESTIONS PRESENTED.

1. Under the doctrine of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, in diversity of citizenship cases does the State law of the forum, *Meissner* v. *Papas,* 35 Fed. Supp. 676, 677 (E. D. Wisc.), or the Federal law determine whether a remittitur of an excessive jury verdict may be allowed in order to defeat a motion for new trial? In other words, does the doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* modify or overrule the rule as to remittitur as stated in *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72, and *Dimick* v. *Scheidt,* 293 U. S. 474?

2. Under the law of the State of the forum, or under the Federal rule, when the amount of damages plaintiff should recover in a breach of contract action is unliquidated can an excessive verdict be remitted when there is no mathematical justification for the jury's error or for the amount of the remittitur, without denying the right of trial by jury under Amendment VII of the Constitution of the United States? *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52-53; *Garfield Aniline Works, Inc.,* v. *Zendle,* 43 Fed. (2d) 537, 538 (CCA 3d); *Otte* v. *Otte,* 259 Ky. 741; *Merrick* v. *Holt,* 8 Ky. Law Rep. 162, 164-165.

3. In a diversity of citizenship case under the State law of the forum or under the Federal Rule, where the amount of damages the plaintiff should recover in a breach of contract action is unliquidated and there is no mathematical justification for the verdict after remittitur because it is still excessive, can a District Court deny a motion for new trial because of the remittitur without denying the right of trial by jury under Amendment VII of the Constitution of the United States? *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S. 41, 52-53; *Garfield Aniline Works, Inc.*, v. *Zendle*, 43 Fed. (2d) 537, 538 (CCA 3d); *Otte* v. *Otte*, 259 Ky. 741; *Merrick* v. *Holt*, 8 Ky. Law Rep. 162, 164-165.

4. When under the law of the State of the forum the parol evidence is a matter of substantive law, does the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, require that the parol evidence rule be considered a matter of substantive law binding on the District Court, and not as a rule of evidence subject to Rule 43(a) of the Federal Rules of Civil Procedure? *American Sumatra Tobacco Corp.* v. *Willis*, 170 Fed. (2d) 215, 216 (CCA 5th); *Russell* v. *Barnes Foundation*, 143 Fed. (2d) 871 (CCA 3d), certiorari denied 323 U. S. 771.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the Court of Appeals in affirming the ruling of the District Court approved its ruling that the law of the State of the forum in diversity of citizenship case, under the doctrine of *Erie Railroad*

Co. v. *Tompkins, supra,* determined whether a remittitur should be allowed in order to defeat a motion for new trial. In this manner the court decided a Federal question which has not been settled by this Court since its decision in *Erie Railroad Co.* v. *Tompkins, supra.* The question should be settled, as it is of the greatest importance to the general uniform administration of justice in the Federal courts. *Meissner* v. *Papas,* 35 Fed. Supp. 676, 677 (E.D. Wisc.); *L. E. Whitham Const. Co.* v. *Remer,* 105 Fed. (2d) 371 (CCA 10th); *contra, Rice* v. *Union Pacific R. Co.,* 82 Fed. Supp. 1002 (D. C. Neb.). The same reason applies to the question of which law governs matters of parol evidence in diversity cases when by the law of the forum the parol evidence rule is a matter of substantive law. *American Sumatra Tobacco Corp.* v. *Willis,* 170 Fed. (2d) 215, 216 (CCA 5th).

2. The Court of Appeals, by its order affirming the District Court, rendered a decision in conflict with a decision of this Court (*Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52-53) and with other courts of appeals as to the law determining questions of remittitur in diversity of citizenship cases dealing with contracts (*Garfield Aniline Works, Inc.,* v. *Zendle,* 43 Fed. (2d) 537, 538 (CCA 3d)), as well as the question of which law governs matters under the parol evidence rule in the same situation. *Wootton Hotel Corp.* v. *Northern Assurance Co.,* 155 Fed. (2d) 988, 990 (CCA 3d); *American Sumatra Tobacco Corp.* v. *Willis,* 170 Fed. (2d) 215, 216 (CCA 5th); *Russell* v. *Foundation,* 143 Fed. (2d) 871 (CCA 3d), certiorari denied 323 U. S. 771.

3. The Court of Appeals, by its decision affirming the District Court, has failed to apply the Kentucky rule governing remittitur that it held applicable. Thus, the Court of Appeals has wrongfully determined a question of local law. *American Sumatra Tobacco Corp.* v. *Willis,* 170 Fed. (2d) 215, 216 (CCA 5th); *Russell* v. *Barnes Foundation,* 143 Fed. (2d) 871 (CCA 3d), certiorari denied 323 U. S. 771.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings by said Court had in this case, numbered and entitled on its docket, No. 10,783, General Box Company v. Central Metal Products Company, Inc., to the end that this cause may be reviewed and determined by this Court, and for such other and further relief as to this Court may seem proper.

GENERAL BOX COMPANY,
Petitioner,

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Supreme Court of the United States

No. _____

GENERAL BOX COMPANY, - - - *Petitioner,*

v.

CENTRAL METAL PRODUCTS COMPANY, - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the District Court (R. 84) was in memorandum form and is not officially reported. No opinion was rendered by the United States Court of Appeals for the Sixth Circuit. The Court of Appeals entered an order affirming the District Court on April 7, 1949 (R. 97), and denied the petition for rehearing May 9, 1949 (R. 109).

II.

JURISDICTION.

The jurisdictional statement at page one of the petition for writ of certiorari is adopted.

III.

STATEMENT OF THE CASE.

The Summary Statement of the Matter Involved in the petition for writ of certiorari is hereby adopted.

IV.

SPECIFICATION OF ERRORS.

(1) The Court of Appeals was in error in affirming the District Court's order of remittitur and denial of the petitioner's motion for new trial, as there is no mathematical justification for either the amount of the remittitur or the verdict after remittitur in this breach of contract case. *Koenigsberger* v. *Richmond Silver Mining Company,* 158 U. S. 41, 52-53. In this case the total loss of profits recoverable by the respondent was an unliquidated amount. *Clark* v. *Sidway,* 142 U. S. 682. Thus, under the Federal rule prior to *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, error has been committed. *Garfield Aniline Works, Inc.,* v. *Zendle,* 43 Fed. (2d) 537, 538 (CCA 3d), see *United Press Association* v. *National Newspaper Association,* 254 Fed. 284, 286 (CCA 8th).

(2) The Court of Appeals was in error in affirming the District Court's judgment, because in diversity of citizenship cases under the doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* the law of Kentucky governed remittitur, *Meissner* v. *Papas,* 35 Fed. Supp. 676, 677 (E. D. Wisc.); and under the law of Kentucky as set

forth in *Brown* v. *Morris,* 3 Bush 81, 83; *Louisville & Nashville Railroad Co.* v. *Earl,* 94 Ky. 368, 22 S. W. 607; *Masterson* v. *Hagan,* 17 B. Monroe 325, 331, 333; *Merrick* v. *Holt,* 8 Ky. Law Rep. 162, 164, 166, and *Otte* v. *Otte,* 259 Ky. 741, 83 S. W. (2d) 42, a remittitur should not have been allowed, but a new trial should have been granted.

(3) The Court of Appeals was in error in affirming the order of the District Court as to prejudicial evidence that had been admitted over objection contrary to the parol evidence rule, which under the law of Kentucky is a matter of substantive law. *Erie Railroad Co.* v. *Tompkins, supra; American Sumatra Tobacco Corp.* v. *Willis,* 170 Fed. (2d) 215, 216 (CCA 5th); *Russell* v. *Barnes Foundation,* 143 Fed. (2d) 871 (CCA 3d), certiorari denied 323 U. S. 771; *Humphries* v. *Haydon,* 297 Ky. 219, 222; *Johnson* v. *Johnson,* 297 Ky. 268.

V.

(1) Under the Doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, In Diversity of Citizenship Cases Does the State Law of the Forum or the Federal Law Determine Whether a Remittitur of an Excessive Jury Verdict May Be Allowed In Order to Defeat a Motion for New Trial.

The last pronouncement of this Court on the subject of remittitur counsel has been able to find was the dictum in the case of *Dimick* v. *Schiedt,* 293 U. S. 474, in which grave doubt was cast upon the power of the Federal courts to grant remittitur without violating

the VII Amendment to the United States Constitution. The last complete treatment of the question of remittitur given by this Court was in the case of *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72, 76. Both of these cases were decided before *Erie Railroad Co.* v. *Tompkins, supra,* and therefore the problem of whether the question of remittitur in diversity of citizenship cases is a matter of substantive law or remedial law under the doctrine of that case has not been decided. There is, at present, a conflict between the District courts in this matter. *Meissner* v. *Papas,* 35 Fed. Supp. 373, 377 (E. D. Wisc.); *contra, Rice* v. *Union Pacific R. Co.,* 82 Fed. Supp. 1002, 1008 (D. C. Nebr.). In the present case the District Court assumed the State law applied. Since the Court of Appeals wrote no opinion we do not know upon what theory they proceeded. The problem is a pressing question in the dispatch of business in the Federal courts, and is of such importance in the general administration of justice, that we feel justified in asking this Court to grant certiorari in this case in order that an opinion might be rendered for the guidance of the bar.

The doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* as interpreted in *Guaranty Trust Co.* v. *York,* 326, U. S. 99, 112, modifies and overrules in a diversity of citizenship case the doctrine of *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72, as set forth in the dictum of *Dimick* v. *Scheidt,* 293 U. S. 474. The *Erie Railroad case, supra,* set forth the principle that in the diversity of citizenship cases the substantive

law of the forum should apply in cases brought into the Federal courts. In the *Guaranty Trust Co. case, supra,* this doctrine was clarified, and it was stated in diversity cases there should be no difference in the judgment reached upon the substantive rights of the parties in the Federal courts and in the State courts. Thus, in this type of case, the questions and rules governing remittitur which, of course, affect the final determination of the rights of the parties after the jury has returned its verdict, should be determined under the State law of the forum under the VII Amendment to the United States Constitution. *Meissner* v. *Papas,* 35 Fed. Supp. 676, 677 (E. D. Wisc.); *Bristol Gas & Electric Co.* v. *Boy,* 261 Fed. 297, 302 (CCA 6th); *L. E. Whitham Const. Co.* v. *Remer,* 105 Fed. (2d) 371 (CCA 10th) (footnote 6). Otherwise, there is a denial of the right of trial by jury as guaranteed by the VII Amendment. *Erie Railroad Co.* v. *Tompkins, supra.* We submit that the law of Kentucky applies and the Kentucky rule as to remittitur, as set forth in *Merrick* v. *Holt,* 8 Ky. Law Rep. 162, 164, 166, recently affirmed in *Otte* v. *Otte,* 259 Ky. 741, requires in this case that a new trial be granted, rather than such motions be denied upon the approval of a remittitur.

(2) Under the Kentucky Rule the Motion for New Trial Should Have Been Granted and the Offer of Remittitur Refused, As There Is No Mathematical Justification for Either the Amount of the Remittitur or the Verdict After Remittitur in This Breach of Contract Case.

Since the total amount to be recovered is affected by the District Court's granting of a remittitur as well as petitioner's right to a jury trial is involved, under the doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* and the cases clarifying that doctrine, questions of remittitur are questions of substantive law to be determined by the law of the State of the forum. The contract was made, the breach occurred, and the present case was tried in Louisville, Kentucky, in the District Court for the Western District of Kentucky; therefore, the Kentucky law as to remittitur should apply. The Kentucky rule is set forth in *Brown* v. *Morris,* 3 Bush 81, 83; *Masterson* v. *Hagan,* 17 B. Monroe 325, 331, 333; *Merrick* v. *Holt,* 8 Ky. Law Rep. 162, 164-166. These cases have recently been affirmed in *Otte* v. *Otte,* 259 Ky. 741, which states the Kentucky rule clearly as follows:

> "* * * It was declared by the court that 'when a plaintiff, having a verdict for flagrantly excessive damages, produced by erroneous instructions in his favor, undertakes to cure the error by remitting the excess, he is bound to remit so much that the remainder shall not only be no more than upon the law and evidence the jury might justly have found, but shall be certainly no more than the verdict itself proves him to be entitled to by the

principles of law applicable to the case.' In such case, in order to escape the effect of the erroneous instruction, it rests on the plaintiff to show affirmatively that what remains of the verdict might properly have been found by the jury under proper instructions; and that, under the principles of law applicable to the case, the verdict actually rendered proves that it would have been for such remainder. The principle seems to be that when the jury has acted deliberately on the facts, and has found a verdict justified by both the evidence and the instructions, there may be a remission that will cure the error of the court in giving the instruction which produced the excess in damages, whenever it can be definitely shown how much of the damages must be attributed to the error of the court; and that it lies on the party claiming under the verdict to make this showing.

"But when the objection is that the jury have not acted on the evidence with deliberation, but have returned a verdict so flagrantly against it as to indicate that degree of indifference to the right of the parties and the justice of the case as not only confers power on the court to set it aside, but makes it a duty to do so, in order that the person so sinned against may have his case tried by a fair, serious and impartial jury, the court can not refuse a new trial because he who has the verdict remits so much of it as in the opinion of the court ought not to have been found, rather than take the risk of a second trial by men who will not be controlled by passion or prejudice. In such a case the objection to the verdict goes to the conduct of the jury, and imputes an indisposition to treat the objector's case with the calm consideration which the ends of justice demand. The entire verdict is impeached

as the product of a spirit that infuses into every part of it the taint of positive wrong or of reckless indifference. It may be that the proof of its prevalence can be found most readily in the excessive amount of damages; but when by that or other manifestation its existence is sufficiently shown, it is not seemly to compel the injured party to submit to a verdict so brought forth. It is known that in the matter of amount merely the jury were improperly influenced, and it can not be known that the same spirit did not rule in regard to other matters involved. As to them the principle of Masterson's case would require the common rule to be reversed; the verdict could no longer be maintained by the rule of deference usually applied; but he who, conceding that as to one matter it is flagrantly opposed to the evidence, yet asks to have it upheld as to other matters and issues, about which the evidence is conflicting, must be content to have the court look into the matter, and to see that the law and evidence clearly sustain the verdict as it stands after rescinding that which it confessed to be wrong. Tested by this rule, if it is applicable, there should have been a new trial. But we do not think it applies in cases like this, because every party is entitled in jury cases to have all the issues tried by a jury whose verdict does not convict them of having been governed by prejudice and passion."

Therefore, applying this clear statement of the Kentucky law, there can be no doubt that a new trial should have been granted. Neither the trial judge nor the respondent has ever attempted to mathematically justify the amount of the remittitur, nor the balance

after remittitur. Under the evidence submitted, which would sustain a maximum verdict of $2,006.29 (see calculation, pages 3-4), surely a verdict for $19,000.00 shows that there is a disregard and indifference by the jury for the rights of the parties involved, and that the case was not decided upon the evidence submitted. Under the above cited Kentucky cases the trial court could not cure this error by remittitur, but a new trial must be granted.

(3) Under the Federal Rule the Motion for New Trial Should Have Been Granted and the Offer of Remittitur Refused, As There Is No Mathematical Justification for Either the Amount of the Remittitur or the Verdict After Remittitur in This Breach of Contract Case.

Assuming that we are in error as to the extent of the doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* in the diversity of citizenship cases, and that questions of remittitur are to be determined by Federal rules separate and distinct from the State law of the forum, in that event we must look to the Federal rule as established prior to *Erie Railroad Co.* v. *Tompkins, supra.* The right and power of a District Court to grant remittitur rather than a motion for new trial was determined first in the case of *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72. Grave doubt was cast upon this decision by the dictum in *Dimick* v. *Scheidt,* 293 U. S. 474, and the question has never been settled since the *Dimick case* as to whether such a power still exists in the Federal courts.

However, conceding such power does exist, in following the doctrine of *Arkansas Valley Land & Cattle*

Co. v. *Mann, supra,* which gives the District Court power to grant remittitur, certain rules developed in the Federal courts. One of the rules was that in breach of contract cases remittitur would be allowed only where there is a basis for computing the amount remitted as well as showing that the amount remaining was not excessive because it was justified by an amount the jury could properly have found from the evidence presented in the record. This Court specifically determined this rule in *Koenigsberger* v. *Richmond Mining Company,* 158 U. S. 41, 52, 53. In following this case the Third Circuit in *Garfield Aniline Works* v. *Zendle,* 43 Fed. (2d) 537, 538 (CCA 3d) clearly stated the rule as follows:

> "A verdict will generally be set aside and a new trial granted where it is so excessive as to indicate passion, prejudice, or other improper motive on the part of the jury, where it is contrary to the charge of the court, and where, in actions on contract, the excess can not be readily ascertained; but in actions based on contract, if the excess can be readily ascertained, the verdict will be reduced and molded to the proper amount." (Citing cases.)

The decision of the Court of Appeals is directly in conflict with *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52, 53, and *Clark* v. *Sidway,* 142 U. S. 682, and with the rule as stated in the 3d and 8th Circuits in *Garfield Aniline Works, Inc.,* v. *Zendle, supra,* and *United Press Association* v. *National Newspaper Association,* 254 Fed. 284, 286

CCA 8th). Also the case is decided contrary to the decisions of the 6th Circuit itself, as that Circuit has previously allowed remittitur in breach of contract cases only when the error of the jury could be mathematically calculated. *B. F. Sturtevant Co.* v. *Champion Fiber Co.*, 232 F. 1, 8 (CCA 6th); *Huebel Co.* v. *Leaper*, 188 F. 769, 774 (CCA 6th); *Moseby* v. *United States*, 194 Fed. 346, 351 (CCA 6th); compare *Thompson* v. *Camp*, 163 Fed. (2d) 396, 404 (CCA 6th).

In all of the above cases cited it was mathematically determinable that the jury had made an error. The error could be calculated, and the remainder after the deduction of the remittitur was allowed only to that extent, if it could be shown that the remainder was actually the jury's verdict. Such is not the case here. The contract had five months more to run at the time of the trial, and the jury could only estimate future damages. The verdict of $19,000.00 was rendered on the whole of the testimony, good or bad, and the trial court had no means of knowing what matters influenced the jury, and what matters entered into their calculations. The present judgment of $7,500.00 is judge made and possesses only the virtue of being within the amount assessed by the jury. At best it represents an abuse of discretion on the part of the trial judge as the maximum verdict possible under the evidence was $2,006.29. (See calculation, pages 3-4.) Therefore, the right of trial by jury as guaranteed by the VII Amendment to the United States Constitution has been violated, and under the Federal rule a new trial should have been granted rather than the allowance of a remittitur.

(4) When Under the Law of the State of the Forum the Parol Evidence Rule Is a Matter of Substantive Law, Does the Doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, Require That the Parol Evidence Rule Be Considered a Matter of Substantive Law Binding On the District Court and Not a Rule of Evidence Subject To Rule 43 (a) of the Federal Rules of Civil Procedure?

The petitioner contends that the Court admitted prejudicial evidence contrary to the Kentucky Parol Evidence Rule.

Over appropriate objection, Mr. Robert Lenz (R. 28), Mr. William McMahon (R. 37-38) and Mr. William C. Embry (R. 64), were allowed to testify as to negotiations leading up to the contract concerning production under the contract providing:

> "Central Metal Products Company, Inc., shall have exclusive rights to stamp all Generalite box irons used by General Box Company in the Louisville area except those made from steel already in the hands of the present stamping manufacturer on the above date."

Under *Erie Railroad Co.* v. *Tompkins, supra,* in diversity of citizenship cases matters of substantive law are to be determined by the law of the State. The parol evidence rule is not a matter of evidence, but a matter of substantive law under the Kentucky decisions. *Humphries* v. *Haydon,* 297 Ky. 219, 222:

> "* * * 'It is immaterial that no objection was made to the introduction of the oral testimony,

for the rule denying any effect of parol evidence upon a written contract is not merely a rule of evidence but is one of positive law the measure of the rights of the parties being a matter of substantive law.' "

Johnson v. Johnson, 297 Ky. 268, 273.

The same conclusion has been reached by the Federal courts. *Pitcairn* v. *Philip Hiss Company,* 125 Fed. 110, 113 (CCA 3d); *Wootton Hotel Corporation* v. *American Assurance Co.,* 155 Fed. (2d) 998, 990 (CCA 3d).

Thus, in diversity cases whether or not the parol evidence rule has been violated depends upon the law of Kentucky which is binding upon Federal courts within its jurisdiction and does not come under the provision of Rule 43(a) of the Federal Rules of Civil Procedure. *American Sumatra Tobacco Co.* v. *Willis,* 170 Fed. (2d) 215, 216 (CCA 5th); *Russell* v. *Barnes Foundation,* 143 Fed. (2d) 871 (CCA 3d), certiorari denied 323 U. S. 771.

In Humphries v. Haydon, 297 Ky. 219, 222, the Kentucky Rule is stated as follows:

"We have held that all prior or contemporaneous oral negotiations and representations become merged in the writing and it cannot be altered or modified, the conclusive presumption being that the whole engagement of the parties was embodied in the deed. The rights and liabilities of the parties are to be determined thereby." (Cases cited.)

See, also, *Riner* v. *Catron,* 230 Ky. 290, 292; *Hendrix Mill and Lumber Co.* v. *Meador,* 228 Ky. 844, 846.

If contrary to the parol evidence rule the trial court admits testimony or oral negotiations leading up to the contract, with or without objection, such conduct is prejudicial and reversible error. *Humphries* v. *Haydon,* 297 Ky. 219, 222. If under the State law the trial court has violated the parol evidence rule, under the doctrine of *Erie Railroad Co.* v. *Tompkins, supra,* the Court of Appeals was bound by that law in diversity cases, and the judgment of the District Court should have been reversed. *American Sumatra Tobacco Corp.* v. *Willis,* 170 Fed. (2d) 215, 217 (CCA 5th).

Since the trial court allowed error to enter into this case by the violation of the parol evidence rule in permitting verbal evidence to be introduced explaining negotiations leading up to the written contract, as well as the admission of incompetent evidence by the accountant, Ackerson, as to his method of calculating damages, the evidence was prejudicial and erroneous. Where incompetent evidence has been admitted, the damage caused cannot be cured by remittitur. *Jayne* v. *Loder,* 149 Fed. 21, 23 (CCA 3d).

Since the trial court and the Court of Appeals made errors of law on the question of remittitur as well as upon the parol evidence rule under the applicable law of the State of Kentucky, it is submitted that certiorari should be granted in order that this Court may reverse

the decision of the Court of Appeals, and return the case to the District Court for a new trial.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

No. 142.

Supreme Court of the United States

October Term, 1949.

GENERAL BOX COMPANY, - - - Petitioner,

vs.

CENTRAL METAL PRODUCTS COMPANY, Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CENTRAL METAL PRODUCTS COMPANY,
Respondent.

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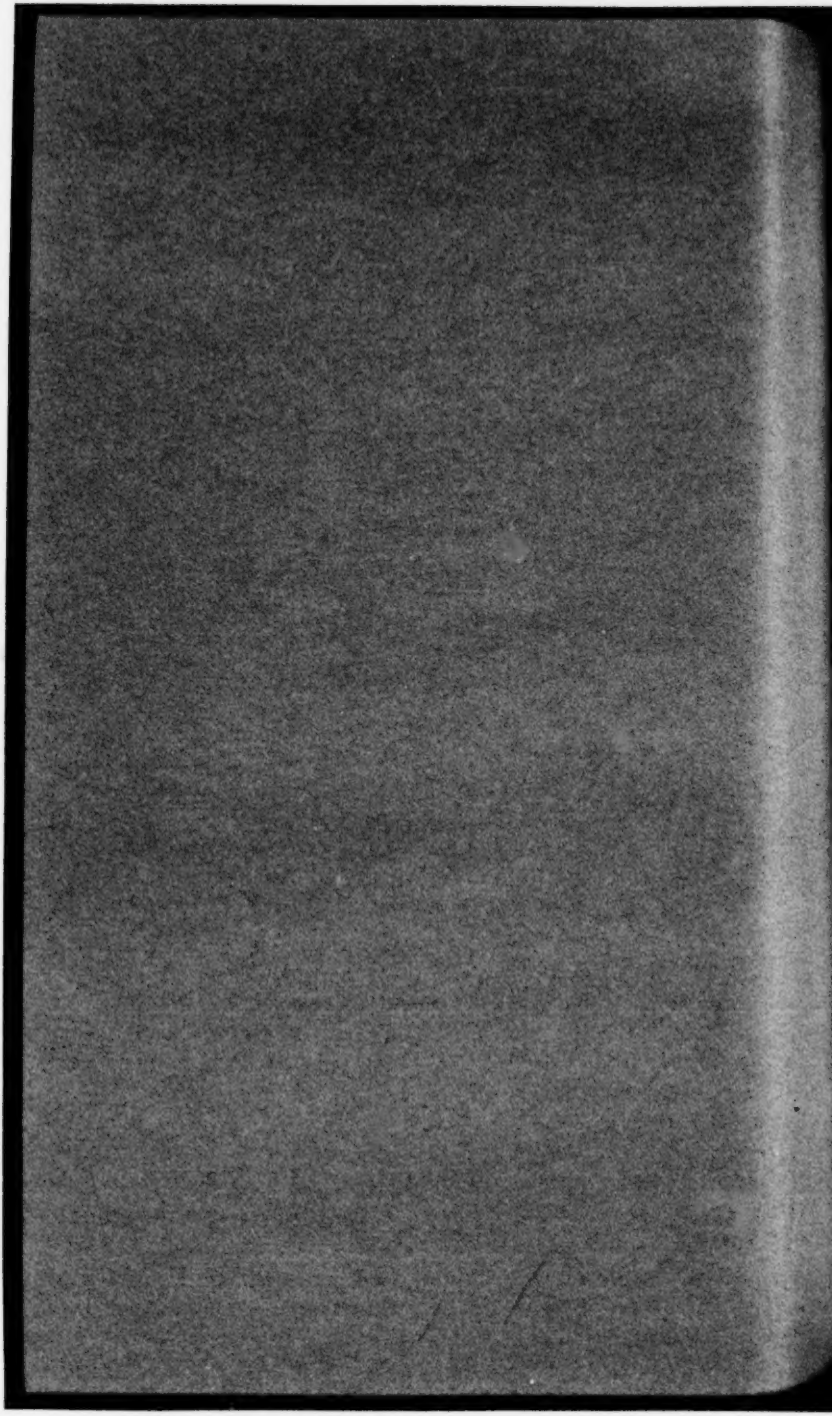

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

October Term, 1949.

No. 142.

GENERAL BOX COMPANY, - - - *Petitioner,*

v.

CENTRAL METAL PRODUCTS COMPANY, - *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent respectfully states:

I.

STATEMENT OF LAW OF THE CASE AND RESPONDENT'S CONTENTIONS RELATIVE THERETO.

We submit that the questions raised by the petition do not come within the purview of Rule 38 of this Court in that

1. *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, has not changed the federal law announced and followed for more than a century relative to the office of remittitur;

2. The law of the Commonwealth of Kentucky relative thereto is in accord and agreement with the federal rule;

3. In a breach of contract action there is no requirement that the trial judge before granting a remittitur must be able to justify his action with mathematical certainty and precision;

4. (a) The parol evidence rule is one of procedure and not of substance;

(b) However, if we are in error in this statement, it is our contention that the law of the Commonwealth of Kentucky is not in conflict with the federal rule, in that evidence which sets forth the circumstances and conditions surrounding the making of a contract, and the position of the parties relative thereto is competent, when it is not introduced for the purpose of altering, contradicting or modifying the terms of the written contract;

(c) That Rule 43(a) of the Federal Rules of Civil Procedure is controlling on this point in the trial of actions before federal tribunals.

II.

ARGUMENT.

The Federal Rule Relative to the Right of the Trial Judge and the Appellate Court to Grant a Remittitur Is Not Violative of the Seventh Amendment to the Constitution and Has Prevailed From the Earliest Decisions of This Court to the Present Date.

Perhaps the earliest case allowing a remittitur is that of *Blunt* v. *Little,* Fed. Cas. 1578, decided by Mr. Justice Story in 1822. The doctrine there enunciated has been consistently sustained in the following cases:

Northern Pacific Railroad Co. v. *Herbert,* 116 U. S. 642, 646, 647, 6 S. Ct. 590, 29 L. Ed. 755; *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72-76, 9 S. Ct. 458, 32 L. Ed. 854; *Kennon* v. *Gilmer,* 131 U. S. 22, 29, 30, 9 S. Ct. 696, 33 L. Ed. 110; *Clark* v. *Sidway,* 142 U. S. 682, 690, 12 S. Ct. 327, 35 L. Ed. 1157; *Lewis* v. *Wilson,* 151 U. S. 551, 555, 14 S. Ct. 419, 38 L. Ed. 267; *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52, 15 S. Ct. 751, 39 L. Ed. 889; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312, 31 S. Ct. 246, 55 L. Ed. 229; *Cf. Gila Valley R. Co.* v. *Hall,* 232 U. S. 94, 104, 105, 34 S. Ct. 229, 58 L. Ed. 521; *Tevis* v. *Ryan,* 233 U. S. 273, 290, 34 S. Ct. 481, 58 L. Ed. 957; *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 334, 38 S. Ct. 318, 62 L. Ed. 751; Also see *Dimick* v. *Schiedt,* 293 U. S. 474, 55 S. Ct. 296; *Mutual Benefit Health & Accident Association* v. *Thomas* (1941), 123 Fed. 2d 353.

In the well-considered case of *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* the Supreme Court had this to say:

> "The practice which this court approved in Northern Pac. R. Co. v. Herbert, is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. Ducker v. Wood, 1 T. R. 277; Hewlett v. Cruchley, 5 Taunt. 277, 281; authorities cited in Sedgwick, Damages, 6th Ed. 762, note 2. But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.

"But it is contended that the plaintiff could not have been required to remit so large a sum as $22,833.33, except upon the theory that the jury, in finding their verdict, were either governed by passion, or had deliberately disregarded the facts that made for the defendant—in either of which cases, the duty of the court was to set aside the verdict as one not fit to be the basis of a judgment. Undoubtedly, if such had been the view which the court entertained of the motives or conduct of the jury, it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury. That was the course pursued in Stafford v. Pawtucket Haircloth Co., 2 Cliff. 82. In that case Mr. Justice Clifford, after observing that the damages were greatly excessive and without support in evidence, said:

> 'Such errors may in many cases and under most circumstances be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.'

"This court is not, however, authorized to assume, from the mere fact that $22,833.33 was remitted, that the court below believed that the jury were governed by prejudice, or willfully disregarded the evidence. On the contrary, it may be inferred that the amount for which the plaintiff was entitled to a verdict was ascertained by

the court, after a calculation based upon the prices of cattle as given by numerous witnesses; or that the court became satisfied that the preponderance of evidence as to the ownership of some of the cattle was against the plaintiff; or, as to other cattle, that they were not traced to the possession of the defendant. But, independently of this view, and however it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this Court. Parsons v. Bedford, 28 U. S. 3, Pet. 433, 447; Mercantile Mut. Ins. Co. v. Folsom, 85 U. S. 18 Wall. 237, 248; New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31. Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made."

There are cases where the office of remittiture cannot be employed, as where the attorney uses prejudicial argument in his address to the jury and where as a result thereof or for any other reason it may be

clearly inferred that the jury's verdict was prompted by passion and prejudice. See *Arkansas Land & Cattle Co.* v. *Mann, supra; Minneapolis Railroad Co.* v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243; *National Surety Co.* v. *Jean,* 61 Fed. 2d 197.

In the case at bar, however, this did not occur, as evidenced by the statement of the trial judge in his memorandum opinion which reads as follows:

> "There is nothing in the record, and defendant's counsel has pointed out nothing in the record, to indicate any passion or prejudice or any appeal to any passion or prejudice on the trial" (Record 87).

The Kentucky Rule Relative to the Right of Granting a Remittitur.

The latest expression of the Court of Appeals of Kentucky relative to the right of the trial judge to grant a remittitur is found in *Otte* v. *Otte,* 259 Ky. 741, 83 S. W. 2d 42. This was an action for alienation of affections. Plaintiff recovered a verdict of $25,000. Plaintiff offered to remit $20,000 of the sum whereupon the Court overruled the motion for a new trial and entered a judgment for the sum of $5,000. The Appellate Court affirmed the action of the trial judge, and in so doing, made the following comment:

> "Conceding this, the appellant argues the action is to recover unliquidated damages, and, though it did so on the plaintiff's motion, the

court was without power to enter a judgment for an amount less than the sum fixed by the verdict.

* * * * * * *

"It is common practice for the courts when in their opinion a verdict for unliquidated damages is excessive, to give the plaintiff the option to avoid a new trial by consenting to the reduction of the verdict to the amount the court deems proper, but the authorities agree that the court is powerless in an action for unliquidated damages to render judgment for less amount than the verdict, unless the party in whose favor it was rendered requests or consents to the reduction, for a reduction without the consent of the recovering party invades the province of the jury. Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296.

* * * * * * *

"It does not follow that simply because the court, at the request or with the consent of the recovering plaintiff, directs a remittitur, an error is committed as to the defendant. The plaintiff's right to a verdict being established, the defendant cannot complain because the court, at the request or with the consent of the plaintiff, fixed the damages at a sum less than the amount of the verdict. The plaintiff is the only party who can complain of the remittitur, unless the evidence is brought here showing the contrary, and only then when he has not been given an option of a new trial or the right to elect to take an amount less than fixed by the verdict and refuses to consent to the remission. The recovering plaintiff has not appealed in the present case; and therefore the appellant, in the absence of the evi-

> dence, cannot question the ruling of the court in directing a remittitur which was favorable solely to her."

Other Kentucky cases dealing with this subject are *Engelman* v. *Central Bank,* 3 Ky. Op. 132; *N. C. & St. L.* v. *Henry,* 168 Ky. 453; *Green* v. *Anderson,* 102 Ky. 216.

In accordance with the Kentucky decisions above quoted, we submit that there is no conflict between the rule relative to remittitur in the Federal Courts and those in the State Courts. But if we are in error in this statement, it is our further contention that the remittitur rule as heretofore applied by the federal decisions is controlling by reason of the Seventh Amendment to the Constitution as indicated by the following authorities:

In *Mutual Benefit Health and Accident Association* v. *Thomas,* 123 Fed. 2d 353 (356) (November 17, 1941), the Court spoke as follows:

> "We think the Seventh Amendment denied to the court the power to increase the amount of the verdict in the instant case. This is not a case where the court denied a motion for a new trial on condition that plaintiff remit a portion of an excessive verdict, but a clear case of a change of the verdict of the jury. Except for such unusual cases, and the case of reservation of decision on motion for a directed verdict as provided by Rule 50 of the Rules of Civil Procedure, or the granting of a new trial, the verdict of the jury must be accepted as conclusive. Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 55 S. Ct. 890,

79 L. Ed. 1636. *We do not think the court was at liberty to follow the practice of the State of Arkansas if that differed from that established by the rules of civil procedure.* United States v. Kennesaw Mountain Battlefield Assn., 5 Cir., 99 F. 2d 830. In actions at law, where issues of fact are submitted to the jury as they were in this case, the judgment must conform to and follow the verdict. Texas Compensation Ins. Co. v. Heard, 5 Cir., 93 F. 2d 548. Under the Seventh Amendment, the national courts are without power to add to a verdict in a common-law action. Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A. L. R. 1150. *This is not a mere rule of procedure but is based upon the inhibition contained in the Seventh Amendment.* Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029." (Italics ours.)

In *U. S.* v. *Kennesaw Mountain Battle Field Association,* 99 Fed. 2d 830, 835, the Court among other things said:

> "And (3) the control of Federal trial courts over verdicts is governed by the decision of Federal courts, not those of state courts" (Citing cases)."

In a Breach of Contract Action There Is No Requirement That the Trial Judge Before Granting a Remittitur Must Be Able to Justify His Action With Mathematical Certainty and Precision.

Many of the cases above cited, beginning with *Blunt* v. *Little, supra,* and including *Arkansas Valley Land Co.* v. *Mann, supra,* and *Otte* v. *Otte, supra,* involve the question of an unliquidated claim for damages. Necessarily the value of these claims could not be ascertained with mathematical certainty any more so than could a claim for personal injury. The jury must necessarily speculate as to the amount of its verdict. In some instances the trial Court or the Appellate Court was of the opinion that the verdicts were too large and in order that justice might be done, the remittitur rule was adopted and thus litigation was curtailed and expense and time was saved. If Courts were powerless to remit a portion of a judgment unless they could with certainty determine the exact amount due a plaintiff, litigation would be interminable and justice would be throttled.

The District Court Did Not Err in Permitting Testimony of the Negotiations Leading Up to the Execution of the Contract.

In order that the Court may intelligently pass on the question raised under this heading by the petitioner, we submit a condensed statement of facts.

The petitioner, as its name implies, is engaged in the manufacture of wooden boxes and at its Louisville

plant constructs small boxes for the use of those engaged in the beer, soft drink and similar business. At each end of the box there is a metal strip placed around the sides and bottoms, for the purpose of strengthening and preserving the life of the container. These strips are commonly referred to as "box irons."

Respondent is engaged in the manufacture of tools and dies.

During the spring of 1947 General Box Company had negotiated with the Central Metal Products Company for the manufacture of the box irons. This work had formerly been done by the Louisville Tool & Die Company. Before entering into a contract with Central Metal Products Company, a discussion was had between the parties as to various terms of the contract and among others respondent was anxious to ascertain the number of irons which it could reasonably expect to manufacture and the petitioner was anxious to know whether or not Central Metal Products Company would be in a position to supply its needs with the required number of irons (T. R. 28, 38, 64, 65). The cost to respondent of manufacturing these irons was $5.2932 per thousand (T. R. 48), and the mean contract price as later agreed upon was approximately $13.80 per thousand (T. R. 49).

For one and a half years prior to May, 1947, petitioner had been using from 60 to 70 thousand box irons per month (T. R. 68). Testimony relative to these negotiations was given by Robert Lentz (T. R. 28), William McMahan (T. R. 38) and William C. Embry, Vice-President and General Manager of the

General Box Company (T. R. 64-65) and when counsel for respondent began to interrogate this last witness along the lines indicated, counsel for the petitioner stated, "He can interrogate him any way he chooses without any objection" (T. R. 64). This testimony was not introduced for the purpose of altering, contradicting or varying the terms of the contract but was for the sole purpose of showing the position of the parties, their intentions relative thereto and the preparations that respondent made to carry out the terms of the contract. The contract speaks for itself.

On May 19, 1947, a contract was entered into between the parties whereby the Central Metal Products Company was to manufacture box irons for the General Box Company for a period of sixteen months at a price of $3 or $4 per thousand cheaper than it at that time was paying for the same workmanship and material. A tool and die machine and a shearer for the cutting of the steel when it arrived at respondent's plant, were purchased and installed at a cost of approximately $4,500 and space was set aside for the purpose of carrying out the terms of its contract. Two cars of steel were consigned to the respondent by the petitioner shortly after the making of the contract for the purpose of enabling it to begin operations. Within a few days thereafter the petitioner prevailed upon the respondent to release the material and the Central Metal Products Company, acting in good faith and relying upon the statements of the officers of the petitioner corporation that there was an urgent

need for the steel at some of its other plants, relinquished the shipments and within a few days thereafter, much to respondent's surprise it was informed that the General Box Company had decided to abrogate the contract and would not comply with its terms. As is stated by the petitioner (T. R. 3) "The making of the contract was properly shown (R. 2-24) and the breach of the contract was not denied by the petitioner (R. 72). The question here involved is the amount of damages."

The evidence further shows that the petitioner continued purchasing the "iron bands" from the manufacturer who had theretofore produced them but at the reduced price submitted by respondent, and thus a saving of $3 to $4 per thousand was effected (T. R. 69).

In October, 1947, the respondent's officers and its attorney advised the petitioner that it would seek redress for the breach of its contract, whereupon the petitioner's business immediately receded and the recession was so great that notwithstanding the increase in business in all lines of industry throughout the country and notwithstanding the fact that the cost of petitioner's production was reduced by reason of the lower cost of manufacturing the box irons that by the time the trial was had, which was five months before the termination of the contract, the petitioner had practically ceased the manufacture of this type of box at its Louisville plant (T. R. 68-69).

In substantiation of our contention that the testimony above outlined was properly admitted for the

purposes heretofore announced, we quote from the following federal decisions:

In the case of *Lincoln National Life Ins. Co.* v. *Horwick,* 115 Fed. 2d 892, the Court made this comment:

> "In the first place, we think the oral testimony was properly admitted. We need not analyze the authorities upon which appellant relies to the effect that a written instrument, clear and unambiguous on its face, cannot be contradicted by parol evidence. This is a recognized rule. There is another rule, however, just as firmly established, and that is that parol or extrinsic evidence is admissible to explain the purpose of the execution of a written instrument, what the parties intended, the consideration for its execution and the circumstances surrounding its execution."

In the case of *Modoc County Bank* v. *Ringling,* 7 Fed. 2d 535, 540, the Court cited the following rule with approval:

> "It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same right which the parties possessed when the contract was made. Merriam v. U. S., 107 U. S. 437, 441, 2 S. Ct. 536, 540 (27 L. Ed. 531), citing Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Barreda v. Silsbee, 21 How. 146, 161, 16 L. Ed. 86; Shore v. Wilson, 9 Cl. and Fin. 355, 555; McDonald v. Longbottom, 1 El. & El. 977; Munford v. Gething, 29 L. J. C. P. 110; Carr v. Montefiore, 5 B. & S. 407; Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622."

The Courts of Kentucky are in accord with the rule announced by the federal judiciary, as shown by the following decisions. In *Morehead* v. *Citizens Deposit Bank,* 130 Ky. 414 (418), the Court said:

> "The first question is: Did J. T. Morehead occupy the relation of surety on a note of J. W. Morehead? For the purpose of determining this question, we are not confined solely to this instrument executed, but may consider parol evidence."

In the later case of *Myers Brothers* v. *Hager,* 266 Ky. 3, 98 S. W. 2d 36, in which an action was brought upon a contract relative to road material, the Court, among other things, said:

> "In construing their contract we must look to and consider all of its language, as well as the subject matter with which it deals, in the light of the circumstances accompanying the parties at its execution. It is our duty so to construe it as to give it such effect, and none other, as the parties to it intended at the time it was made. To this extent only was the parol evidence permissible."

See also *Lincoln National Life Insurance Co.* v. *Means,* 264 Ky. 566, 95 S. W. 2d 264, and cases cited therein.

Rule 43 of the Federal Rules of Civil Procedure among other things provides:

> "All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied

in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the U. S. Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

We submit that under both the Federal and State rule the testimony was competent.

We shall not lengthen this response with quotations from the evidence relative to the number of iron bands which petitioner would have required had it faithfully carried out the terms of its contract, save and except to say that the jury was within its rights in awarding the respondent a judgment of $19,000 and that the remittitur required by the trial judge which reduced respondent's judgment to the sum of $7,500 was far below the maximum amount which the evidence justified.

Since respondent was prevented by the wrongful action of petitioner from performing any part of the contract, the loss of profits must be an approximation. Under such conditions exact proof as to the loss is not required as shown by the following excerpt from the Kentucky Court of Appeals in *Gutseit* v. *Strader,* 158 Ky. 131:

"It may be that Gutseit had done but little mail order business; but where an express contract is violated, the court will not be over-nice

in requiring proof of actual loss; for this is hard to be shown."

In view of the foregoing, we ask that the petition for writ of certiorari be denied.

Respectfully submitted,

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